IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

TUESDAY, THE 12TH DECEMBER 2006 / 21ST AGRAHAYANA 1928

CRL.A.No. 267 of 2006(C)

SC.151/2004 ON THE FILE OF THE COURT OF THE ADDL.DISTRICT & SESSIONS JUDGE (ADHOC) COURT-I, KOLLAM
CP.118/2003 of JUDL.MAGISTRATE OF FIRST CLASS, SASTHAMCOTTA

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APPELLANT:

REGHU, S/O.SANKU, C/NO.9369,
CENTRAL PRISON, TRIVANDRUM 695 012.

BY ADV. ADV.BINDHU SREEKUMAR.(STATE BRIEF.)

RESPONDENT:

STATE OF KERALA, REPRESENTED BY THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.C.M.NAZAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 12/12/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.Thankappan, J.

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Crl. A. No. 267 of 2006

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Dated this the 12th day of December, 2006

JUDMENT

Accused in S.C.No.151/2004 on the file of the Court of the Addl. District and Sessions Judge (Adhoc) Court-I, Kollam is the appellant. He was charge-sheeted for the offences punishable under section 8(1) and (2) of the Abkari Act. The prosecution case against the appellant is that on 20-11-2001 at about 11.30 A.M. the appellant was found carrying 10 litres of arrack in a black cannas of that capacity through the publlic road leading from VKS Junction to Kadappakuzhi. To prove the charge against the appellant, the prosecution examined PW1 to PW5 and Exts.P1 to P5 were marked. Material objects MO1 and MO2 were also marked. On the side of the defence DW1 was examined and Ext.D1 was marked. When the appellant was questioned under section 313 of Cr.P.C., he denied the allegation levelled against him and stated that his mother-in-law was an arrack seller in the locality and due to the enmity towards him, she influenced the excise officials to register the case against him by utilizing the contraband article seized from her house. Relying on the evidence adduced by the prosecution, the trial court found that the appellant was

guilty of the offences punishable under sections 8(1) and (2) of the the Abkari Act and he was convicted thereunder and sentenced to undergo rigorous imprisonment for three years and to pay a fine of Rs.1,00,000/- and in default of payment of fine to undergo simple imprisonment for a further period of one year. The conviction and sentence awarded against the appellant are under challenge in this appeal.

2. The appeal is filed through the jail authorities. Since no counsel is appointed to defend the case of the appellant, State Brief has been appointed.

3. This Court heard learned counsel for the appellant and the learned Public Prosecutor.

4. Learned counsel for the appellant submits that the the court below went wrong in placing reliance on the official witnesses to find the appellant guilty under section 8(2) of the the Abkari Act. The learned counsel also submits that the trial court went wrong in believing PW1, PW2 and PW4 to hold that the appellant was found in possession of MO1 can which contained 10 litres of arrack. To substantiate the argument of the learned counsel, he relies on decisions of this Court reported in Dominic V. State of Kerala (1989(1) KLT 601 and Narayani V. Excise Inspector (2002 (3) KLT 725.

5. To prove the case against the appellant, the prosecution relies on

the evidence of PW1, PW2, PW4 and PW5. Though PW3 was examined as an independent witness to prove the seizure of MO1 can, he turned hostile to the prosecution. PW1 who detected the offence had given evidence that on the date of the incident while he along with other officials including PW2 were on patrol duty and when they reached the public road leading from VKS Junction to Kadappakuzhi, the appellant was found in carrying 10 litre black can which contained full of arrack. He also stated that on seeing them, the appellant tried to turn back and go away, but he was intercepted and on examination they found the can contained full of arrack. He further stated that the appellant was arrested on the spot and after collecting the sample, the remainder in the can and the sample bottle were sealed, labeled and seized describing the same in Ext.P1 mahazar. The evidence of PW1 was fully corroborated by the evidence of PW2 who accompanied PW1. PW4 is the Excise Inspector who had given evidence before the court stated that he continued the investigation and produced the contraband article before the court and filed the final charge.

6. Question to be considered in this case is whether or not the evidence adduced by PW1 and PW2 can be accepted to prove the case against the appellant?

7. PW1 was cross-examined by the defence counsel. He stated that on seeing the excise party, the appellant tried to turn back and go away.

Further case of PW1 is that after preparing Ext.P1 mahazar, the sample was taken in a bottle of 375 ml. capacity and sample bottles were sealed and labelled. PW2 stated that the label affixed on the sample bottle and the can containing the remainder were with the signatures of the appellant, independent witnesses and that of PW1. Learned counsel for the appellant pointed out that even though as per Ext.P4 thondi list, MO1 can and the samples were produced before the court on 20-11-2001 itself and those articles were returned to keep safe custody until further orders. It has come out in evidence that after preparing Ext.P1 mahazar, the sample was taken in a bottle of 375 ml. capacity and sample bottles were sealed and labelled. It has also come out in evidence of PW2 that the label affixed on the sample bottle and the can containing the remainder were with the signatures of the appellant, independent witnesses and that of PW1. The trial court found that "MO1 bears no such label and the one seen affixed bears the signature of PW1 alone. The defence suggestion that the contraband article seized from the place of occurrence is not the one produced before the court and marked as MO1 was not properly answered. PW4 had not stated anything about the delay in production of the sample. Decisions of this Court reported in Dominic V. State of Kerala (1989(1) KLT 601 and Narayani V. Excise Inspector (2002(3) KLT 725 are relevant in this case. In Dominic V. State of Kerala (Supra) this Court had taken the view that

"**when S.36 of the Abkari Act and paragraphs 17,26, 34, 49 and 77 in the Manual are read together, as they should be, it is clear that seizure should be reported to the Court 'forthwith', and request made for sending a sample for analysis**'. A power is given to do a certain thing in a certain manner, the thing must be done in that way or not at all. It has come out in evidence that MO1 bears no such label and the one seen affixed bears the signatures of PW1 alone. No proper explanation was given regarding the label affixed on MO1. There is no evidence to show that the sample and residue were kept in the proper custody till the date of producing the same before the court. The appellant had a definite case that he was arrested from his house by an officer stating that a warrant is pending against him and only because of the reason that he involved in a previous case, this case is now foisted against him. A suggestion was put to PW1 that Saradha involved in somany abkari cases and only because of the instigation of Saradha the case was foisted against the appellant was also not properly answred. She was not examined by the prosecution. Considering the facts and circumstances of the case, this Court is of the view that the evidence adduced by the prosecution to prove the case against the appellant is not free from doubt.

8. In the result, the conviction and sentence awarded against the appellant in S.C.No.151/2004 on the file of the Court of the Addl. District and Sessions Judge (Adhoc) Court-I, Kollam are set aside and the appellant is acquitted. Hence, the appellant shall be released forthwith unless required in any other case.

K. Thankappan,
Judge.

K. Thankappan,J.

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Judgment

12-12-2006